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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-184

ALDO M. LOVISI and MARGARET LOVISI,

Petitioners,

—v.—

A. E. SLAYTON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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vs.

A. E. SLAYTON, et al.,

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners Aldo M. Lovisi and Margaret Lovisi respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, en banc, affirming a decision of the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out in the Appendix, infra, at pp. 1a to 24a. The opinion of the District Court is reported at 363 F.Supp. 620 (1973), and is set out in the Appendix, infra, at pp. 25a-49a. The orders of the Supreme Court of Virginia refusing the petitioners' requests for writs of error and supersedeas on the direct appeals of their convictions are set forth in the Appendix, infra, at pp. 50a-51a. The oral decision of the State trial judge, denying the motion to dismiss, is set forth in the Appendix, infra, at p. 52a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a state statute forbidding oral-genital contact between husband and wife is unconstitutional.

2. Whether the right of marital privacy is a right which in some circumstances can be voluntarily shared with a third person without automatically being "dissolved" as against instrusion by the state.

3. Whether a married couple who voluntarily invite an individual into their home thereby engage in "public" conduct and lose their right to "selectively" invoke their right of marital privacy against intrusion by the state.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Code of Virginia:

Section 18.1-212. Crimes Against Nature. If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.[1]

* * *

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[1] After petitioners' convictions in this case, a major revision of the Virginia Penal Code was enacted. However, the only change made in the Crimes Againt Nature provision was an increase of the maximum sentence. See Va. Code Ann. §18.2-361 (1975 rev.).

STATEMENT OF THE CASE

The petitioners in this habeas corpus proceeding, Aldo and Margaret Lovisi, husband and wife, were convicted in Virginia state courts of sodomy with each other in violation of Va. Code Ann. §18.1-212. They challenged the constitutionality of the statute, facially and as applied to them, through the state court system and then sought federal habeas corpus relief. They were originally convicted on September 22, 1970, after a bench trial and sentenced to two years' imprisonment. On appeal, the Virginia Supreme Court denied writs of error on September 1, 1971, and this Court denied a petition for certiorari, with Mr. Justice Douglas dissenting, 405 U.S. 998 (1972).

The petitioners filed their federal habeas petition on August 9, 1972, when they were both in custody. The evidence before District Judge Mehrige showed that the Lovisis had occasionally placed advertisements in a "swingers" magazine, in which they sought to contact others interested in erotic experiences. Earl Dunn answered such an advertisement, and the three met together on three occasions. The last meeting ended in the Lovisis' home in Virginia Beach, Virginia. The three engaged in sexual activity in the Lovisis' bedroom, during which Margaret Lovisi performed fellatio upon her husband and upon

Dunn. Polaroid pictures were made of this activity, although there was a sharp dispute over the circumstances in which they were taken. Mrs. Lovisi's daughters by a former marriage, then 11 and 13 years old, testified that they were present in the bedroom and took the pictures. Dunn[2] and Lovisi denied that the young girls were present and testified that they took the pictures, sometimes with the aid of a time-delay device. The guilty verdict in the state court did not resolve the dispute about the presence of the girls, although the district judge was disinclined to accept their testimony. See App., infra, p. 41a.

In any event, at some point, one of the girls appeared in school with a picture, subsequently destroyed, said to have been of one of the girls and a man, both unclothed.[3] This discovery led to the procurement and execution of a search warrant, and a police

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2/ Dunn testified for the prosecution. His participation in the incident, however, resulted in his deportation to his native Jamaica.

3/ This picture was destroyed before the police came to the school to interview the girls; as a result, the officers had no first-hand knowledge of its contents.

officer testified that hundreds of erotic pictures were found in the house. Aldo Lovisi testified that the pictures taken of the couple and Dunn were kept in a locked box in a locked gun cabinet. The police raided the gun cabinet and box, and seized five or six pictures depicting the Dunn incident and marital sodomy. See App., infra, p. 30a. 4/

In its opinion, the District Court recognized that the right to privacy protected petitioners' conduct with each other, App., infra, pp. 32a-36a. However, the District Court concluded that by carelessly exposing erotic photographs generally to the possibility of discovery by Mrs. Lovisi's daughters, the couple had waived their right to privacy, and consequently, could not contest their convictions. App, infra, pp. 40a to 44a.

4/ These pictures were never admitted into evidence at the sodomy trial, the prosecutor having withdrawn the proffer when their admission was resisted. However, they remained physically in the state court record. That entire record being of necessity available to the federal district court, they became a part of its record.

The Court of Appeals, having sua sponte ordered reargument en banc, affirmed the judgment of the district court, but on a different ground. The five-judge majority held that when a third party is invited to witness intimate activities with a married couple, "federal protection of privacy dissolves," App., infra, p. 6a. In dissent, Judges Winter, Craven and Butzner argued that petitioners' non-public conduct was constitutionally protected and that there had been no waiver of privacy rights. App., infra, pp. 8a to 24a.

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the right of sexual privacy and the constitutionality of a state statute prohibiting oral-genital contact between husband and wife in the privacy of their own bedroom. The Virginia sodomy statute challenged in this case makes it criminal for the partners in a marriage to express their mutual love and affection through conduct engaged in at times by millions of couples in the nation. This Court has never squarely ruled whether such a law violates the constitutional right of privacy, and it is essential that the Court do so. It should be noted that despite the more complex factual setting of this case, the sole question raised here is the con-

stitutionality of convicting a husband and wife for sexual conduct with each other which occurred behind closed doors in their marriage bed.

There can be little doubt that the majority of the Court of Appeals committed grave error and reached a result at odds with this Court's decisions recognizing the fundamental constitutional right of privacy. See Roe v. Wade, 410 U.S. 113, 152-54 (1973), and cases there cited. Although the Court of Appeals assumed that the forms of sexual conduct in which a married couple engages when alone cannot be constitutionally regulated, App., infra, p. 5a, it went on to reach the remarkable conclusion that petitioners had "waived" that right by engaging in such conduct in the presence of a third person. App., infra, pp. 6a-7a.

This "waiver" theory is logically untenable and legally spurious. It completely misapprehends the nature of the right of privacy as it has been developed by this Court. The key error of the majority below lies in its confusion of the "privacy" protected by the Constitution with the concept of secrecy in human relationships. Properly understood, the right of privacy clearly permits those who invoke it to share their privacy with third parties without, at the same time, waiving the right as against the state. Secrecy is

not a prerequisite to invocation of the right of privacy. Performance of abortion, Roe v. Wade, supra, requires the services of a doctor and perhaps many supporting personnel. A marriage ceremony, Loving v. Virginia, 388 U.S. 1 (1967), requires the presence of at least a celebrant and witnesses. Contraceptive devices normally must be obtained from someone outside the family. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1971). That is not to say that sexual acts performed by a married couple in a theater or on a street are constitutionally protected. In such acts, presumably there would be no reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), because the general public is invited to witness them. On the other hand, where a sexual encounter is handled discreetly, as here, and in no way obtrudes upon public consciousness or sensibility, the participants do have a reasonable expectation of privacy which must be respected by the state. 5/

5/ Under the waiver theory of the majority below, the sexual research and therapy reported in, e.g., Masters & Johnson, Human Sexual Response (1966), and The Pleasure Bond (1975), would be subject to prosecution under the Virginia statute or others like it.

The presence of a single invited guest in the marital bedroom does not serve as a waiver of all privacy rights. Nothing that petitioners or their guest did was "public" in the normal sense of that term. The right of privacy has evolved so that it permits the "selective" treatment of the state as an intruder, even though other persons may have been invited to share the individual's privacy. Mr. Justice Brandeis, for example, described the right as one that "conferred, as against the government, the right to be let alone." Olmsted v. United States, 277 U.S. 438, 478 (1928)(dissenting opinion). Cf. Katz v. United States, supra, 389 U.S. at 352 ("the uninvited ear"). The citizen who engages in conduct that does not impinge upon public awareness or legitimate public concerns can indeed "selectively claim the state is an intruder," App., infra, p. 6a, for the state is different - vastly different - from individual fellow citizens: it represents all the people, it monopolizes the armed coercive might of law, and it and all its concerns are public. Thus, unless secrecy is an indispensable element of the right of privacy, it follows that the petitioners did not waive their right by their non-public breach of secrecy to a third person, and this Court should so hold.

Whether or not petitioners could constitutionally be punished under a narrowly drawn statute for their involvement in or

photography of group sexual acts, or for morals offenses involving the children, this Court should hold, as the dissenters below suggested, that the consensual sexual activities of marriage partners inter se cannot, in themselves, ever be criminal. In the words of the dissent below, "the nature and kind of consensual sexual intimacy" is simply "beyond the power of the state to regulate or even to inquire." App., infra, p. 13a. If "the state may not restrict marital sexual relations to those whose object or risk is that of procreation, Griswold, supra,...the state is powerless to brand as [criminal] other consensual sexual practices within the marital relationship." App, infra, p. 14a. Certainly the decision of a couple to engage in oral-genital contact instead of reproductive intercourse is as intimately private as is their decision to use artificial means of contraception. The state simply has no power to legislate in this area.

Moreover, the protection afforded to activity which takes place in the home, such as occurred here, is even stronger. As the Court recognized in Stanley v. Georgia, 394 U.S. 557, 565 (1969), even if a particular act may be prohibited elsewhere, an individual has "the right to satisfy his intellectual and emotional needs in the privacy of his own home."

Finally, the decision below also conflicts with decisions of various federal and state courts striking down sodomy statutes on constitutional grounds. See Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968), cert. denied, 393 U.S. 847 (1969); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970), vacated on other grounds, 401 U.S. 989 (1971); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973); United States v. Doe, 12 Cr.L. Rep. 2531 (D.C. Super.Ct. 1973); Commonwealth v. Balthazar, 318 N.E. 2d 478 (Mass. 1974); State v. Elliott, 88 N.M. 187, 539 P.2d 207 (N.M. App. 1975).

If the decision below is allowed to stand, its logic would allow the police to obtain warrants for the search or even the surveillance of "the sacred precincts of marital bedrooms for telltale signs" of sodomy. "The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold v. Connecticut, supra, 381 U.S. at 485-86. This Court must insure that such a result is impossible by affording constitutional protection to all of the consensual private sex acts of married persons.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1976

APPENDIX

DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Publish

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2337

Aldo Mario Lovisi
Margaret Lovisi,

Appellants,

versus

A. E. Slayton, Jr.,
Superintendent, Leake
Parrish, Superintendent,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued November 11, 1975 Decided May 12, 1976

Before HAYNSWORTH, Chief Judge, BOREMAN, Senior Circuit Judge, WINTER, CRAVEN, BUTZNER, RUSSELL, FIELD and WIDENER, Circuit Judges, Sitting En Banc, on Resubmission.

Harvey Bines and Richard E. Crouch [court-appointed counsel] for Appellants; (John F. Mark, Richard H. Cornfield, and Steven V. R. Whitman [third year law student] on brief for Amicus Curiae for the American Civil Liberties Union Foundation); Robert E. Shepard, Jr., Special Counsel (Andrew P. Miller, Attorney General of Virginia, and Jim L. Chin, Assistant Attorney General of Virginia, on brief) for Appellees.

HAYNSWORTH, Chief Judge

The petitioners in this habeas corpus proceeding. Aldo and Margaret Lovisi, husband and wife, were convicted in the state court of sodomy with each other in violation of Va. Code Ann. § 18.1-212.[1] They challenged the

1. Section 18.1-212. Crimes against nature. - If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

constitutionality of the statute, as applied to them, through the state court system and then sought federal habeas corpus relief. After a hearing, the district judge concluded that the Lovisis had waived their constitutional right to privacy in their marital conduct and, consequently, their right to contest their state convictions of sodomy with one another by carelessly exposing erotic photographs to Mrs. Lovisi's young daughters. Lovisi v. Slayton, 363 F.Supp. 620 (E.D. Va. 1973). We affirm.

From time to time the Lovisis had placed advertisements in a magazine, "Swinger's Life," in which they sought contact with others interested in erotic sexual experiences. Earl Romeo Dunn answered one such advertisement, and the three met together on three occasions. The last occasion was in the Lovisis' home in Virginia Beach, Virginia. The three engaged in sexual activity in the Lovisis' bedroom, during which Margaret Lovisi performed fellatio upon her husband and upon Dunn. Polaroid pictures were made of this activity, and Mrs. Lovisi's daughters by a former marriage, then 13 and 11 years old, testified that they were present in the bedroom at the time, described what they saw and testified that they took the Polaroid pictures. Dunn[2] and Lovisi denied the pres-

2. Dunn testified for the prosecution. His participation in the incident, however, resulted in his deportation to his native Jamaica.

ence of the young girls and testified that they took the pictures, sometimes with the aid of a time-delay device.

The general verdict of guilty in the state court did not resolve the dispute in the testimony about the presence of the young girls and their taking the pictures. The district judge was disinclined to accept the disputed testimony of the girls, but he did find that the Lovisis had relinquished their right of privacy by carelessly exposing pictures of their sexual activity to the girls. The entire matter had come to light when one of the girls appeared in school with a picture, subsequently destroyed, said to have been of her and of an adult male, both completely unclothed. This resulted in the execution of a search warrant, and the policeman testified that hundreds of erotic pictures were found in the house. Lovisi, however, testified that the pictures taken of himself and his wife and their companions were kept in a box in a gun cabinet which, as described by him, was quite insecure, and these were among the pictures seized by the police.

The Constitution recognizes a right of privacy with respect to those rights regarded as "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152 (1973). The personal intimacies of marriage, the home, procreation, motherhood, childbearing and the family have been held "fundamental" by the Supreme Court and, hence,

have been encompassed within the protected rights of privacy.[3] We may thus assume that the marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy. What they do in the privacy of the marital boudoir is beyond the power of the state to scrutinize. The question we face, however, is whether they preserve any right of privacy when they admit others to observe their intimacies.

Married couples engage in acts of sexual intimacy. That they do is no secret. Though they converse with friends or write books about their sexual relations, recounting in explicit detail their own intimacies and techniques, they remain protected in their expectation of privacy within their own bedroom. State law protects them from unwelcome intruders, and the federal constitution pro-

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3. Cf. Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); id., at 460, 463-465 (White, J. concurring); Stanley v. Georgia, 394 U.S. 557, 568 (1969); Loving v. Virginia, 388 U.S. 112 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

tects them from the state in the guise of an unwelcome intruder.

What the federal constitution protects is the right of privacy in circumstances in which it may reasonably be expected.[4] Once a married couple admits strangers as onlookers, federal protection of privacy dissolves. It matters not whether the audience is composed of one, fifty, or one hundred, or whether the onlookers pay for their titillation. If the couple performs sexual acts for the excitation or gratification of welcome onlookers, they cannot selectively claim that the state is an intruder. They possess the freedom to follow their own inclinations in privacy, but once they accept onlookers, whether they are close friends, chance acquaintances, observed "peeping Toms" or paying customers, they may not exclude the state as a constitutionally forbidden intruder.

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4. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n. 15 (1973); Roe v. Wade, 410 U.S. 113, 154-155 (1973); Katz v. United States, 389 U.S. 347, 351-352 (1967); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354, 358 (1973); Chesebrough v. State, 255 So. 2d 675, 679 (1971).

The answer to the question when the right of privacy is lost cannot turn upon numbers, preserved if there is one onlooker or two, but not if there are three, or preserved if there are ten, but not if there are eleven. Nor should it turn upon the fact that the onlookers, however many, are not only passive observers but are participants themselves in sexual activity, some of it with one or more of the partners to the marriage. In either such event, the married couple has welcomed a stranger to the marital bedchamber, and what they do is no longer in the privacy of their marriage.

The presence of the onlooker, Dunn, in the Lovisis' bedroom dissolved the reasonable expectation of privacy shared by the Lovisis when alone. Hence, we affirm the district court's refusal to issue the writ.

AFFIRMED.

A D D E N D U M

After this opinion was prepared and circulated, but before it was filed, the Supreme Court summarily affirmed a decision of a statutory three-judge court dealing with this same statute as applied to adult homosexuals alleging that they were engaged in homosexual activity in private. Doe v. Commonwealth's Attorney for City of Richmond, E.D. Va. 403

F. Supp. 1199; affirmed, ____ U.S. ____ (March 29, 1976).

In upholding the statute as applied to homosexual acts between two consenting adults in private places, the Supreme Court necessarily confined the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship. At least it reinforces our conclusion that the oral sexual activity of the Lovisis in the presence of Dunn and a camera was not within the area of the constitution's protection.

WINTER, Circuit Judge, with whom CRAVEN and BUTZNER, Circuit Judges, concur, dissenting:

We accept as settled law the majority's assumption that marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy. We reject, however, the majority's implied premise that this marital right of privacy is restricted to those situations in which it is enjoyed in secret. In this regard, the majority's opinion is unsupported either by reason or by authority. We would hold that vis-a-vis one another, Aldo and Margaret Lovisi, as husband and wife, cannot constitutionally be guilty of sodomy in violation of Va. Code Ann. § 18.1-212, by reason of consensual sexual intimacies

of whatever nature, whether practiced in secret or in the presence of a third party or a camera; and therefore the judgment of the district court should be reversed, with a direction to issue the writ. From the majority's contrary conclusion, we respectfully dissent.

I.

The majority's opinion states the facts sufficiently. We stress that the only issue before us is whether Aldo and Margaret Lovisi, husband and wife, may be criminally punished for consensual sodomitic acts performed on each other in the presence of Earl Romeo Dunn. Margaret Lovisi was also convicted of committing sodomy with Dunn, but the validity of that conviction is not before us. See Lovisi v. Slayton, 363 F.S. 620, 621 (E.D. Va. 1973).

II.

That there exists a marital right of privacy need not be merely assumed; it is positive law. Beginning with the early decisions of Meyer v. Nebraska, 262 U.S. 390 (1923), which invalidated a statute regulating the teaching of modern foreign languages in schools, and Pierce v. Society of Sisters, 268 U.S. 510 (1925), which invalidated a statute requiring that children be sent to public schools, the Supreme Court has gradually evolved a concept of liberty applying

to family life which has elevated the marital relationship to a place of near inviolable sanctity. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court invalidated an habitual criminal sterilization statute, noting that "[m]arriage and procreation are fundamental to the very existence and survival of the race," 316 U.S. at 541, and applying a strict scrutiny test to a state scheme for sterilization of some habitual criminals based on a disputed theory that criminal traits are inheritable.

The concept that a right of privacy attached to the marriage relationship was articulated by several members of the Court in Poe v. Ullman, 367 U.S. 497 (1961), a case which concerned but did not reach the merits of Connecticut's statute prohibiting the use of contraceptives. Mr. Justice Douglas, dissenting, characterized the statute which "reaches to the intimacies of the marriage relationship" as "an invasion of the privacy that is implicit in a free society." 367 U.S. at 519-21. Mr. Justice Harlan, also dissenting, described the case as one in which "the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law." 367 U.S. at 548. For this reason, he was of the view that "[t]he statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. . . .

This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.'" 367 U.S. at 548. Mr. Justice Stewart concurred in both dissents.

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court invalidated Connecticut's statute rendering the use or the giving of advice about the use of contraceptives a criminal offense. A majority of the Court concurred in an opinion which stated:

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 381 U.S. at 486.

The separate opinions filed recognized no less. Mr. Justice Goldberg said that "the

right of privacy is a fundamental personal right," 381 U.S. at 494, and that the statutes before the Court "deal with a particularly important and sensitive area of privacy--that of the marital relation and the marital home." 381 U.S. at 495. Mr. Justice Harlan restated his views in Poe, and Mr. Justice White treated as "belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty." 381 U.S. at 502.

Following Griswold, the Court invalidated Virginia's statute prohibiting interracial marriage as unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment, Loving v. Virginia, 388 U.S. 1 (1967); and in Eisenstadt v. Baird, 405 U.S. 438 (1972), invalidated a statute which made the exhibition of contraceptives and the giving of contraceptives to an unmarried person criminal acts. The Court found an insufficient state interest, i.e., health or morals, to justify the prohibition and concluded that it denied equal protection of the laws to unmarried persons. Although dictum, the plurality opinion of Mr. Justice Brennan said:

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be

> equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. 405 U.S. at 453.

Finally, in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), the Court recognized a related right of privacy--the right of a woman to terminate a pregnancy by an abortion, unqualified to the end of the first trimester of pregnancy and qualified thereafter by proper state regulation to preserve the state's interest in the preservation and protection of maternal health and preservation of the life of a viable fetus.

From these cases we would conclude that certainly within the marital relationship, and perhaps in some instances even without, the nature and kind of consensual sexual intimacy is beyond the power of the state to regulate or even to inquire. If the

state may not restrict marital sexual relations to those whose object or risk is that of procreation, Griswold, supra, we think that the state is powerless to brand as sodomitic other consensual sexual practice within the marital relationship.

III.

Given the premise that a sufficient state interest to regulate or to inquire into consensual marital intimacies does not exist, we turn to the question of whether this marital right of privacy exists only if the consensual conduct is carried on in secrecy. We think that existence of the right is not conditioned upon secrecy.

The marital right of privacy--a term which lends itself to confusion since the term carries with it connotations of secrecy--[1] is not founded solely upon the Fourth Amendment. In Fourth Amendment cases, a voluntary relinquishment of one's reasonable expectation of secrecy, such as a consent to search, waives the right. Cf. Poe v. Ullman, 367 U.S. at 551-52 (Harlan, J., dissenting). The marital right of priv-

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1. The dissenting opinion of Judge Craven well articulates this point.

acy has a base broader than the Fourth Amendment alone and the cases recognizing the right pitch it on grounds that belie that secrecy is a necessary element.

Certainly Meyer v. Nebraska, Pierce v. Society of Sisters, and Skinner v. Oklahoma, the foundations from which the right of marital privacy was developed, had nothing to do with secrecy. Their outcome depended upon the nature of the activity sought to be regulated and the relationship of that activity to a protected right. In Griswold, the Court invalidated Connecticut's ban on the use of contraceptives at the behest of a doctor who was permitted to assert the rights of his patients who came to him for advice about contraceptives. These patients were admitting an outsider into their marital intimacies by seeking counseling and advice about contraception, yet they were not held to have lost their right to constitutional protection. Most recently, in Roe v. Wade, the Court, in upholding a woman's exercise of her right to "privacy" by having an abortion, explicitly noted that "[t]he pregnant woman cannot be isolated in her privacy." 410 U.S. at 159. Not only was the developing fetus involved, but the abortion would have to be performed by a doctor, probably with the assistance of others.

Based on these authorities, we conclude that secrecy is not a necessary element of

the right and that therefore the right exists, whether or not exercised in secret.[2]

We are at a loss to understand how or why the majority concludes otherwise. Its conclusion is unsupported by any authority; nor do we think it supported by reason. The majority assumes that the Lovisis have a constitutional right to practice marital sodomy in secret, and further suggests that this right would not be lost or "waived" if they talked or wrote about their sexual activities. Presumably this protection would extend to non-obscene but explicit photographs and movies even if sold on a

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2. Just as secrecy is not essential to the assertion of a "privacy" right claim, the fact that conduct is carried on in secret does not itself entitle it to protection. "[I]t would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. . . . Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however, privately practiced." Poe v. Ullman, supra, 367 U.S. at 552-53. See Doe v. Commonwealth's Attorney for the City of Richmond, 403 F.S. 1199 (E. D. Va. 1975)(three-judge court), aff'd, _____U.S._____ (March 29, 1976).

commercial basis; yet, if a husband and wife were to seek certain types of medical help in an attempt to save a marriage endangered by sexual maladjustment, or if due to economic necessity, or for any other reason, they share a bedroom with other family members, under the majority's holding the state may prosecute them for certain types of consensual marital acts. Surely these absurd results suggest that the presence of Dunn is irrelevant to the question before us. What would not be punishable sodomy in Dunn's absence is not rendered punishable sodomy by his presence, although his presence may, of course, give rise to other prosecution for other crimes.[3]

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3. We would not foreclose the possibility that even married persons may be prosecuted for sodomitic acts performed on each other in public, under a properly drawn statute which makes clear that public exposure is the gravamen of the offense. While a married couple's consensual sexual conduct itself can never be made criminal, even if carried on in public, sexual conduct may nevertheless be an element of another offense.

When the state chooses to regulate the public sexual conduct of married persons, it must choose means less intrusive to the marital relationship than the bald criminalization of the marital sexual intimacies themselves. In his dissenting opinion in

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IV.

Finally, we comment on the majority's claim of support for its holding from the recent summary affirmance in Doe v. Commonwealth's Attorney for the City of Richmond, 403 F.S. 1199 (E.D. Va. 1975), aff'd, ____ U.S. ____ (March 29, 1976). That case upheld the validity of an application of the

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Poe v. Ullman, 367 U.S. 497 (1961), Mr. Justice Harlan stressed that even assuming that the state was entitled to reach a moral judgment that the use of contraceptives by married couples was immoral and that the state could implement its policy by prohibiting the sale of contraceptives to be used by married persons, the state could not criminalize the act of using contraceptives:

> Though the State has argued the Constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy. Id. at 554.

Similarly, while the state may punish public exposure of marital sexual conduct, it may not choose means which make the act of sexual conduct the dominant characteristic of the offense.

statute with which we are concerned to consensual homosexual acts between adults in private.

The Supreme Court's affirmance was summary. While it is an adjudication on the merits of the question which was presented, Hicks v. Miranda, ____ U.S. ____ (1975), the basis for the Supreme Court's conclusion is necessarily obscure because it was unarticulated. The case may have been decided in contravention of the statements in some of the authorities on which we rely, thus overruling them, or it may have been decided on a narrower basis not inconsistent with them. Until the Supreme Court speaks more definitively, no one can tell. Of course, we would apply the holding in a case in which Virginia sought to punish consensual homosexual acts between adults, but we decline to go further and speculate whether it constitutes an adjudication, confirming or detracting from the principles on which we and the majority rely, or indicating what we should decide here.

CRAVEN, Circuit Judge, dissenting:

I dissent because I think it is dangerous to withdraw from any citizen the protection of the Constitution because he or she is amoral, immoral or just plain nasty. The point I make is a factual one. It will not be understood without knowing what the case

is about, and to make that clear I begin by stating what it is not about. It is not about group sex. It is not about sexual activity, deviant or otherwise, in public. The Lovisis attack their charges and convictions under a statute making their conduct with each other while married criminal --whether or not in public and without regard to the presence or participation of a third person.

Most of the court's opinion consists of a narrative of the sort found in "adult" bookstores. Had the case been properly tried in the Virginia state court, we would not even know this sodid story because Dunn's participation is irrelevant and highly prejudicial to the question of the Lovisis' guilt of a violation of Virginia's crime against nature by their conduct with each other. Just as a jury cannot forget such evidence erroneously received, neither, apparently, can we.

The great freedoms enumerated in the first ten amendments are known to all Americans by name, e.g., speech, press, religion, etc. What may be the greatest of all, antedating the Constitution as well as the Bill of Rights, has not yet been christened. "Liberty" is too much.

The "right of privacy," apt in some cases, is a misleading misnomer in others including this one. This freedom may be

termed more accurately "the right to be let alone,"[1] or personal autonomy, or simply "personhood."[2] One thing for sure--it is

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1. Mr. Justice Brandeis coined this phrase in the course of dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. . . .

2. In his dinner address to the American Law Institute in May 23, 1975, Professor Freund said:

> The theme of personhood is...emerging. It has been groping, I think, for a rubric. Sometimes it is called privacy, inaptly it would seem to me; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood. We all

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not limited to the conduct of persons in private. Marriage, normally a public ceremony, is protected.[3] Mrs.Roe[4] does not lose her right to be let alone to abort because her doctor permits the intrusion of a nurse to assist him. Baird[5] may not be prosecuted for failure to be discreet and secret in lecturing students on contraception.

It is therefore unclear to me why the Lovisis forfeit their right to be let alone in their conjugal relationship because they allowed a third person to be present. The only valid reason I can think of is a moral value judgment that deviant sex is so odious [6]

(continued) know the agonizing judgments that have had to be made and that will have to be made in such diverse areas as abortion and the death penalty, which it seems to me are aspects of this issue of personhood.

3. Loving v. Virginia, 388 U.S. 1 (1967).

4. Roe v. Wade, 410 U.S. 113 (1973). See also Doe v. Bolton, 410 U.S. 179 (1973).

5. Eisenstadt v. Baird, 405 U.S. 438 (1972).

6. Dunn's participation makes it even more odious--but that is another case. I reiterate these cases relate only to the Lovisis' conduct with each other.

that not even the Constitution may be successfully interposed to protect a husband and wife so despicably disposed. However right the court may be as to morals, I do not believe it to be a proper principle of constitutional law.

If there is any more fundamental right of personhood than the conjugal relationship of husband and wife, it does not occur to me. I do not believe it to be within the power of the state to make consensual physical contact between husband and wife criminal;[7] and when convictions are predicated upon that fact alone, the writ must issue.

In order to deny the Lovisis their constitutional right to be let alone in their conduct with each other, the court has amended the indictment in the state court so as to charge the Lovisis with lewd and lascivious behavior in the presence of another and indecent exposure. I agree that they are guilty of both offenses, but I believe this court has not the power to validate convictions of offenses not charged.

7. Again, it is irrelevant to the Lovisis' guilt under this statute that a third person was present; the statute is violated whether or not anyone else is present.

I would hold that the Lovisis are protected by the right to be let alone from a conviction of violating the Virginia crime against nature statute with each other, and I would reverse and remand with instructions to issue the writ.

Judge Winter and Judge Butzner authorize me to say that they join in these views.

DECISION OF THE
UNITED STATES DISTRICT COURT

Aldo Mario LOVISI, et al.

v.

A. E. SLAYTON, Jr.,
Superintendent of the
Virginia State Penitentiary, et al.,

Civ. A. No. 420-72-R.

United States District Court,
E. D. Virginia,
Richmond Division.

Aug. 31, 1973.

Richard E. Crouch, ACLU, Washington, D.C., T. David Thelen, ACLU of Virginia, Richmond, Va., for plaintiffs.

Robert E. Shepherd, Jr., Asst. Atty. Gen., Richmond, Va., for defendants.

MEMORANDUM

MERHIGE, District Judge.

Aldo and Margaret Lovisi, inmates in the Virginia penal system at the time this action was commenced, petition the Court

pursuant to 28 U.S.C. § 2254 for writs of habeas corpus holding invalid their convictions under Va.Code Ann. § 18.1-212 of the crime of sodomy. The Lovisis, husband and wife, were convicted and sentenced to a term of two years by the Corporation Court of the City of Virginia Beach of committing sodomy with one another. Margaret Lovisi was also convicted by that Court of committing sodomy with a third party, one Earl Romeo Dunn, for which she received the maximum sentence of three years' confinement.

The petition reveals that the statutory prerequisites required in order to receive relief under 28 U.S.C. § 2254 have been met in this case. Aldo Lovisi is in custody pursuant to the conviction which he now attacks, and Margaret Lovisi was incarcerated at the time the petition was brought. Her petition is not moot by virtue of the rule of Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). State remedies have been exhausted by means of petitions for appropriate writs to the Virginia and United States Supreme Courts, challenging the convictions on the same constitutional grounds here argued. However, because the attack against the constitutionality of § 18.1-212 based on the first amendment's establishment of religion clause was not raised in the state courts, it will not be considered here.

The sole basis of petitioners' contentions is that the statute under which they were convicted, as applied to them, is unconstitutional. Va.Code Ann. § 18.1-212 provides the following:

> Crimes against nature. - If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.
>
> If any person shall by force carnally know any male or female person by the anus or by or with the mouth he or she shall be guilty of a felony and shall be confined in the penitentiary not less than three nor more than ten years.

It is uncontested that the convictions here under attack involve consensual relations between adults. The petition does not, therefore, raise issues of forcible sodomy. Though counsel initially agreed that an evidentiary hearing was not required in order to decide the issue, the Court subsequently concluded that a limited hearing was required to determine two outstanding issues of fact. See memorandum of June 4, 1973. Said hearing was held

July 27, 1973. The case has been fully briefed by both sides, oral argument was held, and the matter is now ripe for disposition. The Court finds the following facts from the record and the evidence presented before it.

Earl Romeo Dunn first became acquainted with the Lovisis in March of 1969, by means of a magazine titled "Swingers Life." Answering an ad in this magazine by which the Lovisis made known to the public that they wished "to meet people," Dunn arranged to travel to Virginia Beach from Washington, D.C., to meet with the Lovisis on three occasions. The third such occasion encompassed a trip by the three persons to New York with a return to Virginia Beach on March 30, 1969. The following day, on March 31, Aldo and Margaret Lovisi and Dunn engaged in a menage a trois in the bedroom of the Lovisi's home. The record is undisputed that Margaret Lovisi performed fellatio on both her husband and Dunn. It is for these acts that Margaret was convicted, and it was for allowing her to perform fellatio on him that Aldo was convicted.

The record further reveals that polaroid photographs were taken of the acts in issue. There is sharp controversy, however, as to how the pictures were taken. Dunn testified in each of the trials that they were taken by a self-timing device on Aldo's camera. Margaret did not take the stand in

either her own or her husband's sodomy trial, but in a separate prosecution of her husband for corrupting the morals of children, she also testified that the photographs were taken by a self-timing camera. See Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206, 207 (1972). Carolyn and Eugenia Acree, Margaret Lovisi's daughters, however, testified in each trial that they were present in their parents' bedroom while the acts were being committed and that they had taken the pictures themselves. Both girls, aged 12 and 14 respectively at the time of the trials,[1] were able to describe explicitly the acts which they claimed to have seen and photographed. Both Dunn and Margaret Lovisi vehemently deny that the girls were present. At the plenary hearing of July 27, 1973, the Acree girls were not present, but Aldo Lovisi repeated his testimony that the girls did not view the acts in question and did not take the pictures.

On April 18, 1969, the Virginia Beach police were requested by the local welfare office to attend a meeting at the Alanton Elementary School between the two Acree girls, Margaret Lovisi, welfare officers and the school's principal. It appears that

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1 Carolyn Acree was aged 11 at the time of the sexual acts in question, and Eugenia was aged 13.

prior thereto the girls had brought a photograph to school which depicted one of them seated on a sofa beside an adult male. Both girl and man were nude. Although this picture was destroyed by a teacher, it precipitated the conference, at which time the Acree girls stated to a police officer that there were many more similar photographs at their home.

On the strength of this statement, the policeman executed a warrant and searched the Lovisi home. In the course of this search, he uncovered several hundred photographs, four hundred rolls of film, over a thousand paperback books, and numerous magazines, all of which were of an obscene nature. Among the photographs taken from a box in a gun cabinet was a picture of the two Lovisis and Dunn depicting Margaret Lovisi performing fellatio upon Dunn. This was introduced into evidence at Margaret's trial. Other pictures, depicting Margaret performing fellatio on her husband, were identified at Aldo's trial but were not placed into evidence.

Preliminarily, the Court notes the respondents' contention that "great weight" should be accorded the denial of certiorari by the United States Supreme Court in this case. This argument is patently without merit. The Supreme Court, time and again, has stated that the denial of certiorari should be given no weight, either as stare

decisis or in federal habeas corpus proceedings on the same case. Chessman v. Teets, 354 U.S. 156, 164, n. 13, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957); Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). Even the recent mention by a majority of the Court of dissents from the denial of certiorari, United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), drew sharp criticism from Mr. Justice Marshall. He, speaking of the Court's function in reference to cases it chooses to hear, noted that "[r]eliance on denial of certiorari for any proposition impairs the vitality of the discretion we exercise in controlling the cases we hear." 409 U.S. at 461, 93 S.Ct. at 646. The respondents further argue that the Court should consider the petitioners' constitutional claim only if it determines that the state procedures afforded the petitioners did not give them an adequate opportunity to raise this constitutional ground as a defense. In other words, the respondents would have the Court bar itself from considering the constitutionality of the statute upon which the Lovisis were convicted if the state courts had an adequate opportunity to consider this claim. Such a contention, at best, might be argued to the Supreme Court as grounds for overruling Fay v.Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963) and Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). In light of the binding effect of these opinions on this Court, however, the respondents' position is not well taken.

The fundamental issue presented by this case is whether the Constitution of the United States prohibits the imposition of criminal sanctions against heterosexual relations between consenting adults involving oral-genital contact. The precise questions raised before the Court are whether the Constitution ever protects acts between adult partners not married to one another, and if the Constitution does provide protection for some acts involving oral-genital sexual contact, whether it protects the particular acts performed by the Lovisis. The Court is faced with the further question of whether, if the Lovisis' conduct was not constitutionally protected, they may attack the constitutionality of Virginia Code Annotated § 18.1-212 on the basis of the rights of third persons. For reasons which follow, it is not necessary for the Court to render an actual holding on the first two questions. It is, however, necessary for the Court to determine on what constitutional grounds, if any, such sexual acts might conceivably be protected in order to decide whether the conduct of these petitioners might arguably be protected. As will be seen, while the Court is of the opinion that the right to privacy inherent in the federal constitution may well extend to heterosexual relations involving oral-genital contact between consenting adults, the petitioners in this case, having voluntarily relinquished the privacy that would normally have surrounded their acts, are not themselves protected by

such a right. They could, therefore, have been prosecuted for the acts in which they engaged. The Court further holds that they do not have standing to assert the constitutional rights of other persons and thus may not attack the constitutionality of statutes underlying their conviction on this basis. The Court first turns to the nature of the right to privacy and the question of whether the conduct of the Lovisis was constitutionally protected.

The federal constitution does not on its face enumerate a substantive right to privacy. Depending on the facts of the case, this right has been viewed as emanating from the first amendment's guarantee of freedom of association, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and of speech, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the fourth amendment, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the equal protection clause of the fourteenth amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the ninth amendment, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)(Goldberg, J., concurring); the penumbras of the Bill of Rights, id.; and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court is satisfied that the candid approach of Roe v. Wade,

supra, and of Mr. Justice Harlan's concurrence in Griswold v. Connecticut, supra, 381 U.S. at 499, 85 S.Ct. 1678, that the due process clause of the fourteenth amendment provides substantive protection for fundamental human values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), represents the preferred view. While other provisions of the Bill of Rights certainly give guidance to what values are to be so enumerated, the Court would be less than candid if it did not recognize that the process of defining these values represents at least in part a return to the ancient, if somewhat discredited, concept of natural law. However, as Mr. Justice Harlan recognized in Griswold,

> "[s]pecific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretation by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times." 381 U.S. at 501, 85 S.Ct. at 1690.

The conclusion that a court reaches from this consideration of its role is that it is duty bound to apply not only what the Constitution expressly states is the law, but also what by necessary implication from the values on which it is based the Constitution implies is the law. In doing so,

however, a court must further recognize its duty to apply the law "free of emotion and of predilection," Roe v. Wade, supra, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, to the end that it does not act as a superlegislature.

The right to privacy extends to sexual relations between husband and wife. Despite the philosophical differences of the majority in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), as to which constitutional provision encompasses the right to privacy, their agreement was complete as to the sanctity of the marital relationship. As stated by Mr. Justice Harlan, dissenting from a procedural dismissal in Poe v. Ullman, 367 U.S. 497, 552, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961),

> Of this whole "private realm of family life" it is difficult to imagine what is more private or intimate than a husband and wife's marital relations
> . . . .
> . . . the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to

> forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Va.Code Ann., § 18.1-212 regulates no less than the actual form of sexual expression between husband and wife. It invades the marital bed, informing the couple of the conduct in which they may or may not engage. As it applies to a married couple, this law doubtless threatens an invasion of the right of privacy.

Similarly, this Court has some doubt as to whether § 18.1-212 could constitutionally be applied to private sodomous acts between heterosexual consenting adults. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), in particular, casts doubt upon the legal viability of the marital-non-narital distinction. In extending the rationale of Griswold to strike down a Massachusetts statute which prohibited the dissemination of contraceptive devices to unmarried persons, the Court declined to restrict the right of privacy in sexual matters to married couples:

> Yet the marital couple is not an independent entity with a mind and heart of its own, but an association

> of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. 405 U.S. at 453, 92 S.Ct. at 1038. See also, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of personal privacy extends to the decision by a woman whether to have an abortion); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)(privacy protects possession of obscene material in one's home).

The Court concludes that the rationale expressed in Eisenstadt extends to protect the manner of sexual relations between unmarried persons. It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy. Accordingly, the statute also poses a threat to the right of privacy possessed by consenting adults.

On the facts of this case, however, the Court is not compelled to make the difficult determination of whether a compelling state interest underlies and justifies Va.Code Ann. § 18.1-212. Even if the statute could not constitutionally be applied to private sexual relations between consenting adults, the Court finds that the relations in this case were not private and concludes that the Lovisis have no right which they can assert. Their conduct was not constitutionally protected.

The phrase "right of privacy" may, unless carefully defined, be misconstrued. This is because privacy can refer either to seclusion or to that which is personal. To describe an act as private may mean that it is performed behind closed doors. It may also mean that the doing of that act is a decision personal to the one performing it and having no effect on others. In the constitutional context, the meaning of privacy is doubtless closer to the latter than the former definition. This does not mean, however, that the United States Constitution guarantees to an individual the right to perform any act which he may choose to do so long as the performance of that act has no meaningful effect on others. Rather, the right to privacy extends to the performance of personal acts or decisions only within certain contexts. Among these protected areas are acts and decisions relating to child bearing, Roe v. Wade, 410 U.S. 113,

93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Eisenstadt v. Biard, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), child rearing; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), marriage; Loving v.Virginia, 388 U.S. 1, 87 S.Ct. 1243, 22 L.Ed.2d 1010 (1967); and private reading within the home, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

Also included among these protected areas, this Court concludes, are intimate sexual relations between consenting adults, carried out under secluded conditions. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). While the right to privacy does not always have a seclusion aspect to it, as, for example, in the securing of an abortion, it does under the rationale of the cases explicating the right have such an aspect when protecting sexual relations between consenting adults. In Griswold, for example, it was the spectre of governmental agents entering the boudoir that greatly influenced Mr. Justice Douglas, speaking for the majority. In Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), the Court in holding that one may possess obscene matter within one's home was persuaded not only by the right of a person to read what he pleases, but also by the private sanctity of the

home.[2] The existence of seclusion in a sexual act, therefore, is a necessary prerequisite to that act's being protected from state regulation by the Constitution. Where that element has been relinquished by the parties in the performance of their sexual act, they have given up the Constitution's protection over the manner in which they choose to carry out that act.

The facts of this case indicate that the Lovisis did indeed relinquish the secluded aspect of their sexual relations. The Court does not reach this conclusion, as the respondent would argue, on the basis of Dunn's presence in the bedroom while Margaret Lovisi performed fellatio on her husband (or, in the case of Margaret's second conviction, the presence of her husband in the room while she performed fellatio on Dunn). It may be that Dunn, as a willing participant, was within the ambit of privacy protected by the Constitution. Nor does the Court reach this conclusion on the basis of evidence that Carolyn

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2. "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. at 565, 89 S.Ct. at 1248.

and Eugenia Acree were present in their parents' bedroom while the acts in question were taking place, though if the testimony of these girls had been uncontradicted, the Court would have no doubt that the seclusion of the Lovisis' acts would have been waived.[3] Instead, the Court based its conclusion on the fact that the Lovisis took photographs of their sexual acts and then allowed these photographs to fall into their children's hands.[4]

In order for their sexual relations to be constitutionally protected, the Lovisis

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3. As noted previously, the Acree girls testified that they had been present throughout the sexual acts and had actually taken the photographs in question. They testified further that their stepfather, Aldo Lovisi, had ordered them to take the pictures. This testimony was directly contradicted by Aldo Lovisi at the hearing of July 27, 1973 and by Dunn and Margaret Lovisi in another trial. The girls' testimony was further impeached by the admission of Carolyn Acree that she would like to see the relationship of her mother and her stepfather broken apart (Tr. p. 80, Commonwealth v. Margaret Lovisi) and that she would like for her mother and stepfather to go to prison so she, Carolyn, and her sister might be returned to their natural father (Tr., p. 58, Commonwealth v. Aldo Lovisi).

4. [See following page for this footnote.]

had the responsibility of ensuring that the seclusion surrounding their acts was preserved. The burden is on the Lovisis to show that under the totality of the circumstances, privacy was not waived. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), holding that in the Fourth Amendment area, the voluntariness of a consent to search by one not in custody is to be determined by the

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4. At the plenary hearing, Aldo Lovisi testified that the photographs were stored in a locked gun cabinet. The Acree girls were instructed not to go into same, but according to Lovisi were never told of the existence of pictures. Nevertheless, Lovisi found that the locks had been tampered with and suspected that one of the girls may have broken in to view the pictures. Further, an argument between Lovisi and his stepdaughter led him to conclude that she may have had knowledge of the acts which he claims were done privately. While Lovisi claims to have taken proper precautions, it is nevertheless clear that the girls knew of the sexual activities which occurred in his bedroom and possessed pictures of sexual acts.

totality of the circumstances.[5] By electing to photograph their sexual relations, thus creating the possibility that the intimacy of their acts would be destroyed by future viewing by others, the Lovisis took upon themselves an especially heavy burden to protect their privacy. They did not meet that burden, the Court concludes, because of their failure to deny other persons access to the photographs.

While the evidence does not reveal that the Acree girls were actually in possession of the photographs depicting the acts here prosecuted, it is clear that they had possession of another sexually oriented photograph. This suggests that snapshots taken by the

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5. Schneckloth held that the rule of knowing and voluntary waiver of Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 has been applied only "to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." In the criminal prosecution context, Johnson shifts the burden to the government to prove waiver. However, the problem here is concerned with the broader question of waiver of a possible constitutional protection by virtue of a course of conduct and not with the waiver of rights associated with criminal prosecution.

Lovisis were not kept at home in such a way that the children would be denied access to them. This suspicion is confirmed by the testimony of the investigating officer who stated that "thousands" of photographs were to be found all over the house. Although the officer could not recall whether the gun cabinet in which he found the pictures in question was locked at the time of his investigation, the only conclusion to be drawn from his testimony is that the photos were freely available throughout the house to whomever lived there. On the strength of this conclusion, the Court holds that the Lovisis did not meet the burden incumbent upon them to preserve the seclusion of their sexual acts. As such they relinquished their right to privacy in the performance of these acts, and they could lawfully be prosecuted for them.

The Court next turns to the issue of whether the Lovisis have standing to attack their conviction on the grounds that Va. Code Ann. § 18.1-212 is unconstitutionally overbroad because it could not be enforced against consenting adults committing sodomitic acts in private. The concept of standing has several aspects. It may refer to standing to sue, which concerns whether the individual is sufficiently affected by that which he assails to insure his adversariness in prosecuting his claim. Or, it may refer as it does here to standing to challenge a particular action or statute on

particular grounds. The principal question surrounding this type of standing is whether the party seeking to challenge an action or statute alleges that it is his rights which have been violated or rather those of some other party.[6]

In United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960), the United States Supreme Court restated the principle of constitutional adjudication concerning the latter sort of standing:

> One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. Id. at 21, 80 S.Ct. at 522.

The Court noted, however, that there are certain exceptions to this general rule. In the area of first amendment freedoms, for example, parties whose conduct is not constitutionally protected may be able to

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6. See generally, Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 72 Yale L.J. 599 (1962).

attack a statute upon which they are charged or convicted because of the chilling effect which that law may have upon others whose acts are protected. E.g., Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). In areas other than freedom of expression, a litigant may base his claim upon the rights of others when those rights will necessarily be affected by the outcome of the litigant's suit. E.g., Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 510 (1965); Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). The Court in Raines also recognized that a defendant in a criminal action might have standing to raise the rights of those who could not constitutionally be prosecuted under the statute where the vast majority of the intended applications of the statute are unconstitutional and when it could be fairly said that the statute was not intended to stand as valid in those few cases where it could be applied lawfully. E.g., Butts v. Merchants & Miners Transportation Co., 230 U.S. 126, 33 S.Ct. 964, 57 L.Ed. 1422 (1913). Similarly, a litigant may raise third party rights where an attempt to sever the constitutional applications of a statute from its unconstitutional ones would require such a revision of its text that the statute no longer gives an intelligible warning of the

conduct it prohibited. E.g., United States v. Reeves, 92 U.S. 214, 23 L.Ed. 563 (1875).[7] The fact that the litigant seeking standing on the basis of another's rights is doing so in a petition for a writ of habeas corpus, as opposed to another sort of criminal or civil litigation, makes no difference. See Eisenstadt v. Baird, supra, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349; United States ex rel Williams v. Zelker, 445 F.2d 451 (2d Cir. 1971).

In order for the Lovisis to have standing to assert the rights of consenting adults acting in private, they must show that their case fits within one of the exceptions noted above. This case clearly does not involve first amendment rights, nor do the Lovisis

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7. One commentator has formulated these last two exceptions into the following principles:

> If a party agaginst whom a statute is sought to be enforced can show preliminaryily non-severability of application or that an attempt to sever would leave standing a statute that would be incapable of giving fair notice of its prohibitions, that party has standing to challenge the statute on the grounds that it infringes the rights of third parties coming within its application.

Sedler, supra, n. 6, at 608.

stand in such a relationship to consenting adults performing sodomitic acts in private that the outcome of their conviction will necessarily affect the rights of those third persons. Unlike the doctor in Griswold v. Connecticut, supra, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, or even the advocate of contraceptives in Eisenstadt v. Baird, supra, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349, the Lovisis' acts did not have the purpose or effect of protecting the rights of third persons. More importantly, the Court sees no obstacle to prevent those who have preserved the privacy surrounding their acts from asserting those rights to attack Va.Code Ann. § 18.1-212.

The Court further concludes that the Lovisis have not established that the Virginia sodomy law is unconstitutional in so many of its applications that it could not have been intended by the Virginia legislature to be left standing to cover persons, such as the Lovisis, who have not preserved their privacy. Although the statute was clearly designed to cover all acts of sodomy, public and private, the Court cannot say that a prohibition against the application of the statute to private acts prevents it from applying in the "vast majority of its intended applications." United States v. Raines, supra, 362 U.S. at 23, 80 S.Ct. at 523. Furthermore, the statute continues to give adequate notice of its prohibitions after its unconstitu-

tional applications are severed from it. It does not become so vague or ambiguous as to be violative of the due process clause of the fourteenth amendment. See Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

The Court must conclude, therefore, that this is a case falling within the usual rule that a party attacking a statute must demonstrate that his own, rather than another's rights are adversely affected by the statute.[8] Accordingly, the Lovisis do not have standing to attack the constitutionality of the statute under which they were convicted.

An order in accordance with this memorandum will issue.

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8. It should be noted that except in those cases involving freedom of expression or where the litigation involving the party charged will necessarily affect the rights of the third persons, courts have been very reluctant to find standing. See, e.g., Reddy v. United States, 403 F.2d 26 (1st Cir. 1968); Douglas v. Beneficial Finance Co., 334 F.Supp. 1166 (D. Alaska 1971).

ORDERS OF THE
SUPREME COURT OF VIRGINIA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of September, 1971.

The petition of Aldo Mario Lovisi for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 22nd day of January, 1971, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy

Teste:

Howard G. Turner,
Clerk

By: /s/ ALLEN L. LUCY
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of September, 1971.

The petition of Margaret Lovisi for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 20th day of January, 1971, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy
Teste:

Howard G. Turner,
Clerk

By: /s/ ALLEN L. LUCY
Deputy Clerk

ORAL DECISION OF
CIRCUIT COURT OF THE CITY
OF VIRGINIA BEACH, VIRGINIA

THE COURT: Gentlemen, if -- if there were any inconsistencies, they certainly weren't serious enough to create in my mind a reasonable doubt. If ever I have a seen a case where there was evidence to prove the charges beyond a reasonable doubt, I think that this is it, and as far as the constitutionality is concerned, I -- I just can't -- I just can't feel that the statute is unconstitutional. I think that if the Legislature had -- had intended to exclude husband and wife, they could have done so by inserting a short sentence, not even a whole sentence, just a short phrase; and at this point I am forced to overrule your motion.